

78-1676

Supreme Court, U. S.

FILED

MAY 4 1979

MICHAEL RODICK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. A-876

COMMONWEALTH OF KENTUCKY

Petitioner

versus

STANLEY RAY SIMPSON

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

ROBERT F. STEPHENS

Attorney General

GEORGE M. GEOGHEGAN, JR.

Assistant Deputy Attorney General

Director, Division of General Legal
Services, and Members of the Bar
of the United States Supreme Court
Capitol Building
Frankfort, Kentucky 40601

ROBERT W. HENSLEY

Assistant Attorney General

Capitol Building
Frankfort, Kentucky 40601
Counsel for Petitioner

TABLE OF CONTENTS

	PAGE
Opinion Below	1- 2
Jurisdiction	2
Question Presented	3
Constitutional Provisions	3
Statement of the Case and of the Facts.....	3- 6
Reasons for Granting the Writ	6- 9
Conclusion	9
Proof of Service	10
Appendix	11-13

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. A-876

TABLE OF CASES AND AUTHORITIES

Cases:

	PAGE
Chapman v. California, 386 U. S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) U. S. reh. den. 386 U. S. 907.	8
Harrington v. California, 395 U. S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1967)	8
Johnson v. New Jersey, 384 U. S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966) U. S. reh. den. 385 U. S. 890	9
Michigan v. Payne, 412 U. S. 47, 36 L. Ed. 2d 736, 93 S. Ct. 1966 (1973)	9
Taylor v. Kentucky , 436 U. S. 478, 56 L. Ed. 2d 468, 98 S. Ct. 1930 (1978)	3, 6, 7, 8, 9
Whorton v. Commonwealth, Ky. 570 S. W. 2d 627 (1978)	6

Miscellaneous:

Fourteenth Amendment, United States Constitution 28 USC § 1257 (3)	3
U. S. Sup. Ct. Rule 22 (1), 28 U. S. C. A.	2
Constitution of Kentucky, § 110 (2) (a) and § 111 (2)	2

COMMONWEALTH OF KENTUCKY - - - *Petitioner*

v.

STANLEY RAY SIMPSON - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The petitioner, the Commonwealth of Kentucky, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky reversing the conviction of the respondent in the Jefferson Circuit Court at Louisville, Jefferson County, Kentucky.

OPINION BELOW

The Trial Court rendered no written opinion in this case. On January 5, 1979, the Court of Appeals rendered an opinion reversing Stanley Ray Simpson's judgment which sentenced him to ten years imprisonment, all Justices concurring (and not to be published), and this opinion is printed in the Appendix to the petition beginning at page 11.

The Mandate of the Court of Appeals of Kentucky was issued February 15, 1979, and appears in the Appendix at page 13.

JURISDICTION

The Judgment of the Court of Appeals of Kentucky was entered on January 5, 1979. The petitioner filed no motion for rehearing in the Court of Appeals pursuant to Rule of Civil Procedure (hereinafter referred to as CR) 76.32 nor a motion for discretionary review in the Supreme Court of Kentucky pursuant to CR 76.20. The reason that these motions were not filed are set out in the petitioner's APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI which was filed in this Court on or about April 6, 1979, and in the interest of brevity will not be set out here. Therefore, for purposes of the petition the court of last resort in this case in Kentucky was the Kentucky Court of Appeals, U. S. Sup. Ct. Rule 22 (1), 28 U.S.C.A. and the Constitution of Kentucky, §110 (2) (a) and §111 (2), and therefore it is the Court of Appeals to which the petitioner prays that a writ of certiorari be issued.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether the Court of Appeals of Kentucky Misinterpreted and Misapplied to This Case the Prior Decision of the Court in *Taylor v. Kentucky*, 436 U. S. 478, 56 L. Ed. 2d 468, 98 S. Ct. 1930 (1978)?

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND THE FACTS

The December, 1977 term of the Jefferson County Grand Jury indicted Stanley Ray Simpson for first degree robbery of the MaJik Market, 7303 Preston Highway on November 21, 1977. Simpson was arraigned on January 12, 1978. The case was passed for trial on February 22, 1978.

When the trial began, and before any witnesses were called, the prosecutor read the indictment. Then without mentioning the indictment again, the prosecutor told the jury what the Commonwealth would prove,

what the witnesses would say. The defense reserved its opening statement.

The evidence introduced by the prosecution tended to show that Simpson, wearing sunglasses and a blue hat, entered the MaJik Market on the evening of November 21, 1977, threatened Judy Hill, the cashier, with a gun and took approximately \$60.00 from the cash register. Ms. Hill, the only eyewitness to the robbery, testified that she identified Simpson from a photo-pack shown to her by Detective Crady. She subsequently identified him at trial.

In addition, it should be noted that Judy Hill had also been robbed about a week before. [Apparently the culprit who committed the first robbery was not apprehended.] Thus, Ms. Hill, from this experience, knew what to look for. "Well, I've been robbed before and I knew the type of questions they were going to ask me—how tall he was, what color of hair he had, what he was wearing, and I wanted to give them a description."

For the defense, Simpson testified that he spent the evening in question with friends at his aunt's house playing cards. This testimony was corroborated in substantial part by his aunt.

At the conclusion of the evidence and before the closing argument the defendant submitted five instructions. The first instruction was that the jury should not be persuaded by outside influences or by the affidavit or nature of the charge but only by the evidence in the case. The second was that if the conclusion which could be drawn from the facts tended to estab-

lish guilt but on the other hand tended to establish innocence the jury must accept the conclusion tending towards innocence. The third instruction was three paragraphs on the presumption of innocence and how it remained with the defendant throughout the trial on through the jury's deliberations. The fourth was a lengthy one on reasonable doubt. And the last one was on unanimity of the verdict and how each juror must have arrived at the conclusion separately. However, the trial court refused these instructions and instructed on: robbery in the first degree (threatening physical force while armed with a deadly weapon) including an instruction that upon a finding of guilt confinement could be fixed at from ten (10) to twenty (20) years; the definitions of "deadly weapon" and "physical force"; reasonable doubt and unanimity of the verdict. The third instruction on reasonable doubt defined this concept as follows: "The term 'reasonable doubt' as used in these Instructions, means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proven, but whether, after hearing all the evidence, you actually doubt that the defendant is guilty."

On the defendant's closing the argument was brief, taking approximately two full pages. During this argument the defendant urged reasonable doubt. The closing by the Commonwealth was longer. During the Commonwealth's closing the prosecutor complimented the police and defense counsel, pointed out weaknesses in the defense case, discrepancies in testimony, identification of the defendant by Ms. Hill as the culprit,

called for a message to the armed robbers in the county, reasonable doubt and concluded that the detectives and witnesses had done their job and now it was in the hands of the jurors. The prosecutor asked for a sentence of twenty (20) years.

Neither attorney objected to the adversary's closing comments.

Stanley Ray Simpson was convicted of first degree robbery and is presently serving a ten year sentence in prison.

REASONS FOR GRANTING THE WRIT

As it can be seen from the attached not to be published opinion of January 5, 1979 by the Court of Appeals of Kentucky, the Court of Appeals reversed on the basis of *Taylor v. Kentucky*, 436 U. S. 478, 56 L. Ed. 2d 468, 98 St. Ct. 1930 (1978) and *Whorton v. Commonwealth*, Ky., 570 S. W. 2d 627 (1978).

Concerning *Whorton* it should be noted that this Court granted a Petition for Writ of Certiorari in the case in a petition styled *Commonwealth of Kentucky v. Harold Whorton*, October Term, 1978. This Court's number of the case is No. 78-749, and oral argument was heard on it by this Court on April 16, 1979, approximately three weeks ago from the date of the instant petition. Without conceding the point, the petitioner recognizes that this petition will be controlled in large part by this Court's decision in *Commonwealth of Kentucky v. Harold Whorton*, October Term, 1978, No. 78-749.

Likewise pending in this Court with issues similar to that raised in this instant petition are (alphabetically by the respondent's last name): *Commonwealth of Kentucky v. James Ronald Avery*, No. 78-1085; *Commonwealth of Kentucky v. Ralph Brannon*, No. 78-750; *Commonwealth of Kentucky v. Edgar Gilbert Miller*, No. 78-1493 and *Commonwealth of Kentucky v. Berry Vaughn Williams*, No. 78-1084.

Since *Commonwealth of Kentucky v. Harold Whorton* contained a discussion of why the petition should have been granted in that case, petitioner in the instant case, in the interest of brevity, will refer this Court to the brief and argument in that case and, in addition, in the instant case will urge to this Court why the Court of Appeals of Kentucky should not have cited *Taylor v. Kentucky*, 436 U. S. 478, 56 L. Ed. 2d 468, 98 S. Ct. 1930 (1978) as one of the two cases requiring reversal of Stanley Ray Simpson's conviction.

Concerning the opening statement in Mr. Simpson's trial, it appears that the prosecutor merely read the indictment. It does not appear that the prosecutor tried to use the indictment as persuasive proof that the defendant committed the crime. In *Taylor* it appears that on opening the prosecutor told the jury that the victim of the crime "took out" a warrant against Taylor and then read the indictment against Taylor to the jury. *Taylor*, 436 U. S. at p. 487. The conduct of the prosecutor in Mr. Simpson's trial was not as emphatic.

Insofar as the jury instructions, it does appear that the same on one reasonable doubt was used here as was discussed in *Taylor*, 436 U. S. at p. 488. And this

brings us to the comments by the prosecutor on closing. Although urging reasonable doubt to the jury, the prosecutor, unlike the one in *Taylor* did not invite the jury to consider the presumption of innocence since it extended to every other defendant who's ever been tried and is in the penitentiary or reformatory today. *Taylor*, 436 U. S. at p. 486. Petitioner would suggest, speculative though it is, that this statement by the Commonwealth in *Taylor* may have been the very one where the Commonwealth went too far thus tipping the scales in favor of the petitioner in this Court's view when the case arrived here. Also, unlike the prosecutor in *Taylor*, where the Commonwealth interjected facts not in evidence by declaring that the first thing a defendant does after ripping off someone is to get rid of the property, *Taylor*, 436 U. S. at p. 487, the prosecutor in Mr. Simpson's case did not interject such facts, or if he did, the respondent in the proceedings below has failed to direct our attention to those comments.

Overall, petitioner suggests that a careful weighing of the facts in *Taylor* with the facts in the instant case, including the conduct of the prosecutor, does not tip the scales of justice in Mr. Simpson's favor but rather in the Commonwealth's. Therefore, the petitioner urges this Court to grant this petition. Specifically, the judgment of the lower court should be reversed and vacated with respect to *Taylor* and respondent's conviction reconsidered in light of applicable harmless-error cases of this Court such as *Chapman v. California*, 386 U. S. 18, 17 L. Ed. 705, 87 S. Ct. 824 (1967), U. S. reh. den. 386 U. S. 907 and *Harrington v. California*, 395 U. S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1967).

As an additional reason for granting this petition, the petitioner would urge this Court to consider that *Taylor* is not the type of decision to be held retroactive. See *Johnson v. New Jersey*, 384 U. S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966) U. S. reh. den. 385 U. S. 890 and *Michigan v. Payne*, 412 U. S. 47, 36 L. Ed. 2d 736, 93 S. Ct. 1966 (1973). The respondent's trial in the instant case occurred before *Taylor* was decided. This point was made to no avail in the Court of Appeals of Kentucky.

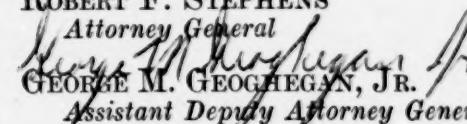
CONCLUSION

For the foregoing reasons and additionally in the interest of the orderly administration of justice in Kentucky in view of the several cases pending in various stages from us in this Court, not the least of which is *Commonwealth of Kentucky v. Harold Whorton*, October Term, 1978, No. 78-749, the petitioner petitions this Court to grant this writ.

Respectfully submitted,

ROBERT F. STEPHENS

Attorney General



GEORGE M. GEOGHEGAN, JR.

Assistant Deputy Attorney General

Director, Division of General Legal Services, and Member of the Bar of the United States Supreme Court
Capitol Building
Frankfort, Kentucky 40601

ROBERT W. HENSLEY

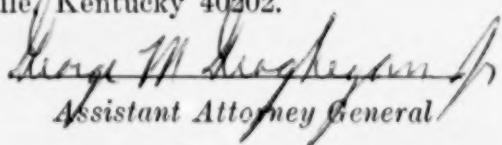
Assistant Attorney General

Capitol Building
Frankfort, Kentucky 40601

Counsel for Petitioner

PROOF OF SERVICE

I, George M. Geoghegan, Jr., Assistant Deputy Attorney General, Division of General Legal Services, and Member of the Bar of the United States Supreme Court and one of counsel for the petitioner, hereby certify that on Thursday, May 3, 1979, four (4) copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid to John C. Scott, Clerk, Kentucky Court of Appeals, Bush Building, Frankfort, Kentucky 40601; Honorable S. Rush Nicholson, Judge, Jefferson Circuit Court, Fourteenth Division, Jefferson Hall of Justice, Louisville, Kentucky 40202; Honorable David L. Armstrong, Commonwealth Attorney, 30th Judicial District, Jefferson Hall of Justice, Second Floor, Louisville, Kentucky 40202, and Honorable Terrence R. Fitzgerald, Deputy Public Defender, Office of the Jefferson District Public Defender, Suite 200, 701 West Jefferson Street, Louisville, Kentucky 40202.



George M. Geoghegan, Jr.
Assistant Attorney General

APPENDIX

OPINION RENDERED: JANUARY 5, 1979
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY
78-CA-662-MR

STANLEY RAY SIMPSON - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - - - *Appellee*

Appeal From Jefferson Circuit Court
S. Rush Nicholson, Judge
No. 160699

REVERSING

BEFORE: HOWERTON, REYNOLDS, and VANCE, Judges.
HOWERTON, JUDGE. Stanley Ray Simpson appeals from a conviction for first-degree robbery and a sentence of ten years imprisonment. Appellant raises two allegations of error. (1) The trial court refused to instruct the jury as to the presumption of his innocence, and (2) The trial court erroneously instructed the jury on the definition of the term "reasonable doubt."

Taylor v. Kentucky, ____ U. S. ____ (May 30, 1978), and *Whorton v. Commonwealth*, Ky., 570 S. W. 2d 627 (1978), are dispositive of the issue regarding failure to instruct the jury on the presumption of innocence, and we must therefore reverse the judgment of the Jefferson Circuit Court.

On remand, the issue regarding the definition of "reasonable doubt" should be resolved by compliance with RCr 9.56.

The judgment of the Jefferson Circuit Court is reversed
for further proceedings consistent with this opinion.

ALL CONCUR.

Attorney for Appellant:

TERRENCE R. FITZGERALD
Jefferson Public Defender
1000 Republic Building
429 West Walnut Street
Louisville, KY 40202

Attorneys for Appellee:

ROBERT F. STEPHENS
Attorney General
ROBERT W. HENSLEY
Asst. Attorney General
Capitol Building
Frankfort, KY 40601

OPINION RENDERED: JANUARY 5, 1979

COURT OF APPEALS OF KENTUCKY

File No. 78-CA-662-MR

STANLEY RAY SIMPSON

v.

COMMONWEALTH OF KENTUCKY

*Appeal from Jefferson Circuit Court
Action No. 160699*

MANDATE

The opinion rendered on the above date, a copy of which is attached hereto and made a part hereof, is now final. It is therefore the mandate of this Court that its ruling, as set forth in the opinion, now be carried out.

A Copy - Attest:

Issued: February 15, 1979

(s) John C. Scott, Clerk